Cole Schotz P.C.

Court Plaza North
25 Main Street
P.O. Box 800
Hackensack, NJ 07602-0800
201-489-3000 201-489-1536 fax

New York
Delaware
Maryland
Texas
Florida

David M. Kohane
Member
Admitted in NJ and NY

Reply to New Jersey Office
Writer's Direct Line: 201-525-6267
Writer's Direct Fax: 201-678-6267
Writer's E-Mail: dkohane@coleschotz.com

December 15, 2016

**Via Electronic Mail (FLANIGAN.SARAH@EPA.GOV)**
**Via Federal Express**

Sarah Flanagan, Esq.
Branch Chief
United States Environmental Protection Agency
NJ Superfund Branch
290 Broadway, 17th Floor
New York, NY 10007-1866

Re: Goldman/DiLorenzo Related Companies' Alleged Nexus and Request for Settlement
Lower Passaic River Study Area of the Diamond Alkali Superfund Site

Dear Ms. Flanagan:

This firm represents the Goldman/DiLorenzo Related Companies[1] ("Goldman/DiLorenzo") concerning Goldman/DiLorenzo's alleged status as a potentially responsible person ("PRP") on the Lower Passaic River Study Area Operable Unit of the Diamond Alkali Superfund Site ("LPRSA"). The United States Environmental Protection Agency ("EPA") has alleged that Goldman/DiLorenzo is a PRP for the LPRSA as a result of third party historical operations at the former American Modern Metals Corp. ("AMMCo") property located at 44 Passaic Ave. (a/k/a 25 Belgrove Drive) in Kearny, New Jersey (the "Property" or "AMMCo Property"). This letter and the accompanying nexus report from Roux Associates Inc. (the "Roux Report") address the apparent bases for EPA's allegation that Goldman/DiLorenzo is responsible for discharges of hazardous substances from the AMMCo Property into the LPRSA. Please add this letter and enclosure to EPA's file on Goldman/DiLorenzo and to the administrative record for the LPRSA.

Goldman/DiLorenzo's only connection to the LPRSA is that it was a passive owner of the AMMCo Property. Goldman/DiLorenzo had no involvement in operations at the Property, the

[1] We understand that "Goldman/DiLorenzo Related Companies" is the designation for EPA's files on our client, which has often been referred to as "DiLorenzo Properties Company on behalf of itself and the Goldman/Goldman/DiLorenzo Partnership." This settlement request is made on behalf of those entities and their affiliates.

hazardous substances used at the Property, or any discharges of hazardous substances at the Property. Rather, the facts concerning Goldman/DiLorenzo show the following:

- Goldman/DiLorenzo, through a partnership named Goldlex Holding Company ("Goldlex"), owned the Property from 1963 until 1988, and DiLorenzo Properties Company ("DPC") owned the Property from 1988 until 1992. Goldlex leased the Property to two entities controlled by Michael Palin until 1980, which in turn leased the Property to AMMCo and others; for the balance of Goldlex's ownership and the entirety of DPC's ownership, the Property was leased directly to AMMCo. Goldman/DiLorenzo had ***zero*** involvement with these tenants' and subtenants' operations at the Property.

- From 1959 until 2004, AMMCo, the primary operator at the Property, manufactured aluminum baseball and softball bats there. AMMCo's operations used limited hazardous substances (aluminum, chlorinated solvents, kerosene, and lubricating oil) and recycled any hazardous waste in its operations or disposed of it offsite. Notably, AMMCo's process operations were a "closed loop" system, meaning that AMMCo did not discharge process wastewater to the Passaic Valley Sewer Commissioners ("PVSC") system.

- Goldman/DiLorenzo cannot be liable under CERCLA as the former owner or operator at the time of disposal because the relevant CERCLA facility – as defined by EPA – is the LPRSA, not upland properties. As Goldman/DiLorenzo never owned or operated the Passaic River, it cannot be liable as a former owner or operator. Nor can Goldman/DiLorenzo be liable as an "arranger": it had no involvement with hazardous substances at the Property, and there is no evidence to even suggest that Goldman/DiLorenzo intended for hazardous substances to be disposed of in the LPRSA.

- Even if Goldman/DiLorenzo could somehow be considered an "arranger" of AMMCo's discharges of hazardous substances, AMMCo nonetheless was not the source of and did not use or generate any of the contaminants of concern that are driving the response costs at the LPRSA. Accordingly, even assuming Goldman/DiLorenzo could have arranger liability for AMMCo's discharges (and it does not), those discharges are not and will not cause the incurrence of response costs in the LPRSA.

In sum, there is no factual or legal basis to conclude that Goldman/DiLorenzo is responsible for LPRSA response costs. Nevertheless, Goldman/DiLorenzo has paid Remedial Investigation/Feasibility Study ("RI/FS") costs and River Mile ("RM") 10.9 removal action costs. Given the issuance of the Record for Decision ("ROD") for the lower 8.3 miles of the LPRSA, and the fact that any assumed discharges from the Property would be, at most, both *de micromis* and *de minimis*, we submit that it is now time for EPA to offer Goldman/DiLorenzo an early buyout settlement to avoid the continued incurrence of unwarranted costs.

## I. FACTS CONCERNING THE ABSENCE OF A NEXUS BETWEEN THE AMMCO PROPERTY AND THE LPRSA

As explained briefly below and at greater length in the Roux Report, the facts concerning the AMMCo Property demonstrate that Goldman/DiLorenzo is not responsible for LPRSA response costs.

### A. AMMCo Property – History of Ownership and Leasing Operations

From the late 1800s until 1959, the AMMCo Property was used by the Marshall Linen & Thread Company for manufacturing of linen thread, material, yarn and sacks. York Associates, Inc. ("York"), a corporation, purchased the Property in 1959 and almost immediately entered into a triple-net, 50-year master lease with Elite Industrial Park, Inc. ("Elite"), a company associated with Michael Palin. Elite, as master-tenant, immediately subleased the Property to various subtenants. The largest subtenant was AMMCo, which used the Property to manufacture aluminum bats and other aluminum items.

York transferred the Property to Goldlex in 1963. Goldlex continued to master-lease the Property to Elite and its Palin-controlled successor, Palin Enterprises (f/k/a E&P Enterprises Co.) until 1980, when Palin's company transferred the master lease to AMMCo.[2] AMMCo continued operating at the Property and became the master-tenant to other subtenants. Goldlex transferred the Property to DiLorenzo Properties Company ("DPC") in 1988, which conveyed title to Kearny Industrial Associates ("KIA") – an AMMCo affiliate – in 1992.

In 2001, KIA transferred the western portion of the Property – the parcel west of Passaic Avenue and closest to the Passaic River – to S&A Realty Corp. (The western parcel will be referred to as the "S&A Parcel," and the parcel farther from the river, east of Passaic Avenue, will be referred to as the "KIA Parcel.")

Neither Goldlex nor DPC ever manufactured or otherwise operated at the Property. They were passive landlords throughout their periods of ownership.

### B. History of Operations

From approximately 1959 until 2004, AMMCo manufactured aluminum products, primarily baseball and softball bats, at the Property. AMMCo used few raw materials in its operations: (i) aluminum, (ii) chlorinated solvents, primarily trichloroethylene ("TCE"), (iii) kerosene, and (iv) lubricating oil.[3] AMMCo's process involved melting aluminum billets, which were then placed in

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[2] On March 31, 2016, EPA sent Palin Enterprises a notice of potential liability.

[3] 1995 Draft Remedial Investigation Report and Remedial Action Workplan ("1995 RIR") § 4.2.3; 1999 Remedial Investigation Report and Remedial Investigation Workplan ("1999 RIR") § 3.2.3.

molds to create a "blank" bat.[4] The blanks were then finished by painting, the insertion of foam, and the attachment of any accessories.[5]

Any waste generated by AMMCo's operations was either recycled or sent off-site for disposal. AMMCo operated a "closed loop system" that reused process wastewater as cooling water (meaning AMMCo did not discharge process wastewater to the PVSC system).[6] In addition, all waste oils and lubricants were processed onsite using a distillation system, and the recycled fluids were reused in operations. For instance, recycled oil was used to coat finished aluminum products with a thin film of oil to prevent oxidation.[7] Likewise, used solvents were distilled, filtered, and reused in operations.[8] Finally, still bottoms generated by the manufacturing process, which would have contained metals, were sold to scrap metal businesses. In sum, AMMCo's operations minimized waste generation and discharge of that waste to the environment.

### C. There is No Evidence that Hazardous Substances were Discharged from the AMMCo Property to the LPRSA

In 2004, EPA sent General Notice Letters ("GNLs") to AMMCo, DPC, and S&A, alleging that they were responsible for discharges of hazardous substances from the Property to the LPRSA. It appears that EPA based its GNLs on a set of documents provided by AMMCo to EPA in February 2004, as detailed in the Roux Report (the "2004 AMMCo Documents").

As the Roux Report explains, the evidence does not support a conclusion that hazardous substances – and, in particular, contaminants of concern ("COCs") in the LPRSA – were discharged

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[4] 1995 RIR § 1.3.

[5] These finishing operations were often undertaken by various AMMCo affiliates or unincorporated "trade names" at the Property: Marshall Clark Manufacturing, American National Supply and Machinery Co., Kearny Industrial Complex, SBC Sports Company, FSB Sports Company, and American Extrusion Tool and Die Co. *See* Stipulation of Settlement (June 25, 1992), at 2-3. These trade names, however, had "no legal existence" apart from AMMCo and were "merely trade names for the marketing of products[.]" *Id.*

[6] New Jersey Department of Environmental Protection Division of Hazardous Waste Management, August 16, 1998 Hazardous Waste Inspection Report.

[7] Dec. 29, 1986 NJDEP Memorandum regarding American Modern Metals/Airlite Aluminum.

[8] March 6, 1984 NJDEP Inspection Form.

from the AMMCo Property.[9] Specifically, no COCs found in the LPRSA can be attributed to operations at the AMMCo Property because:

- AMMCo did not discharge any process wastewater to the PVSC system, and there is a complete absence of evidence of AMMCo directly discharging hazardous substances into the LPRSA.

- There is no evidence of dioxin, nor of mercury (except background levels below EPA RSLs, not from operations), contamination at the Property.

- Although some PAHs have been found in Property soils, those PAHs are attributable to historic fill unrelated to operations or to petroleum, and there is no evidence that any PAH impacts from the AMMCo Property reached the LPRSA.

- Similarly, the small amounts of copper and lead found in Property soils are attributable to historic fill; there is no evidence that these metals were used in operations at the Property.

- PCBs above cleanup standards were detected at one isolated location on the Property, on the KIA Parcel (i.e., the Parcel farther from the river), near a former transformer. However, soil sample tests immediately surrounding that location found no PCB impacts, and NJDEP issued a No Further Action determination in 1992 after the limited impacted area was excavated.

- Concentrations of dieldrin and DDT found at the Property were below background levels. The presence of these hazardous substances likely is attributable to ubiquitous insect spraying in Kearny, not to operations at the Property.

- Although the 2004 AMMCo Documents reflect the presence of one outdoor storm drain to the river from the S&A Parcel in the vicinity of a loading dock, there is no evidence that this drain provided a pathway for any hazardous substances, much less LPRSA COCs, to discharge to the river. On the contrary, no hazardous substances were found in any of the soils near the loading dock (other than PAHs associated with historic fill). NJDEP's inspection of the Property in 1988 confirmed this conclusion: operations on the AMMCo property (including the S&A Parcel) discharged no process wastewater, as a closed loop system was used.

- There is no evidence that Property groundwater is contributing to LPRSA COCs. Any hazardous substances detected in Property groundwater are not LPRSA COCs, except for PAHs on the far eastern portion of the Property (i.e., farthest from the river) attributable to historic fill or petroleum. There is no evidence that PAH groundwater impacts at the

[9] COCs for the LPRSA are dioxins/furans, PCBs, DDT, mercury, copper, dieldrin, PAHs and lead. *See* ROD at 14-16.

Property have discharged into the LPRSA, and in any event, EPA already has concluded that groundwater discharges to the LPRSA are not driving any response costs.

Finally, even if one assumed – contrary to the evidence – that some LPRSA COCs mobilized at the Property during storm events, any runoff from the KIA Parcel would have been captured by combined storm sewers that only would have discharged to the river during overflow events. There is no evidence that any hazardous substances attributable to operations at the Property reached the LPRSA during any of these overflow events. Furthermore, the surface of the S&A Parcel was covered with a gravel yard that would have captured stormwater and, therefore, any hazardous substances carried in stormwater.

On these facts, as more fully set forth in the Roux Report and as explained below, Goldman/DiLorenzo is not responsible for LPRSA response costs.

## II. GOLDMAN/DILORENZO IS NOT LIABLE FOR LPRSA RESPONSE COSTS

To establish that a party is liable under CERCLA, EPA must prove (i) that "the defendant falls within one of the four categories of 'responsible parties'"; (ii) that "the hazardous substances are disposed of at a 'facility'"; (iii) that "there is a 'release' or threatened release of hazardous substances from the facility into the environment"; and (iv) "the release causes the incurrence of 'response costs.'" *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258-59 (3d Cir. 1992); 42 U.S.C. § 9607. As demonstrated below, EPA cannot satisfy these elements as to Goldman/DiLorenzo.

### A. Goldman/DiLorenzo Is Not a Potentially Responsible Party

CERCLA establishes four categories of potentially responsible parties ("PRPs"), at least one of which must be met as a precondition for CERCLA liability: (i) current owners and operators of the CERCLA "facility": (ii) former owners or operators of the CERCLA facility at the time a hazardous substance was disposed; (iii) persons who arranged for the disposal or treatment of a hazardous substance at the relevant CERCLA facility; and (iv) persons who transported a hazardous substance to the relevant CERCLA facility.[10] Goldman/DiLorenzo satisfies none of these four categories, and indeed, only two of these PRP categories are even plausible for Goldman/DiLorenzo – former owner or operator at the time of disposal and arranger. As explained below, black-letter law provides that Goldman/DiLorenzo is not either type of PRP.

[10] *See, e.g., Burlington Northern & Santa Fe Ry. v. United States,* 556 U.S. 599, 608-09 (2009); *Litgo N.J., Inc. v. N.J. Dep't of Envtl. Prot.,* 725 F.3d 369, 379 (3d Cir. 2013).

1. *Former Owner at the Time of Disposal*

A former owner can be responsible for response costs if it owned the relevant CERCLA facility at the time hazardous substances were disposed of.[11] Although Goldman/DiLorenzo owned the Property from 1963 to 1988, and DPC owned the Property from 1988 to 1992, the Property is not part of the relevant CERCLA facility.

Instead, EPA has defined the CERCLA "facility" in this case as the LPRSA, defined as the "the 17-mile stretch of the Lower Passaic River and its tributaries from Dundee Dam to Newark Bay."[12] Goldman/DiLorenzo is not the "former owner" of the LPRSA.

2. *Former Operator at the Time of Disposal*

As with former owner liability, Goldman/DiLorenzo is not the former operator of the LPRSA at the time of disposal – because Goldman/DiLorenzo never operated on the LPRSA. In addition, even if the relevant CERCLA facility included the Property (which, according to EPA, it does not), Goldman/DiLorenzo still is not the former operator of the Property at the time of disposal.[13] A CERCLA "operator" must "manage, direct, or conduct operations specifically related to pollution, that is operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[14]

Goldman/DiLorenzo, as a passive owner of the Property, had no involvement with Property operations at all, let alone the level of involvement sufficient to impose former operator liability.[15]

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[11] 42 U.S.C. § 9607(a)(2) ("any person who at the time of disposal of any hazardous substance owned or operated *any facility at which* such hazardous substances were disposed of") (emphasis added).

[12] EPA, Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study ¶ 24 (May 10, 2007) ("The Lower Passaic River Study Area is a 'facility' as defined in Section 101(9) of CERCLA"); *see id* ¶ 14(1) (defining LPRSA).

[13] "The determination of who operates a facility … is a functional one, which does not depend on ownership." *Virginia St. Fidelco, LLC v. Orbis Prods. Corp.*, No. 11-2057, 2016 U.S. Dist. LEXIS 102641, at *10 (D.N.J. Aug. 3, 2016).

[14] *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998).

[15] *See, e.g., N.J. Dep't of Envtl. Prot. v. Gloucester Envtl. Mgmt. Servs., Inc.*, 800 F. Supp. 1210, 1219 (D.N.J. 1992) (operator liability imposed "where [an] individual shows a high degree of personal involvement in the operation and decision-making process of the business."); *see also United States v. Tarrant*, No. 03-3899, 2007 U.S. Dist. LEXIS 30331, at * (D.N.J. Apr. 25, 2007) ("Court's inquiry should not focus on whether the alleged operator 'had sufficient control to direct the hazardous substance disposal activities or prevent the damage caused,' but should instead seek

CERCLA does not "draw in persons or entities who" – like Goldman/DiLorenzo – "have no connection to hazardous waste disposal" at a given facility.[16]

**3.** *Arranger*

Arranger liability requires that Goldman/DiLorenzo took "intentional steps to dispose of a hazardous substance."[17] As the United States Supreme Court held in *Burlington Northern & Santa Fe Ry. v. United States*, "intentional steps" means that it must be proven that Goldman/DiLorenzo intended to dispose of hazardous substances in the LPRSA.[18] Even knowledge that discharges are or may be occurring fails to establish arranger liability.[19]

Leaving aside for the moment the absence of evidence of discharges of hazardous substances to the LPRSA for which Goldman/DiLorenzo is allegedly responsible, there is absolutely no evidence that Goldman/DiLorenzo intended to dispose of any hazardous substances in the LPRSA, ever. Goldman/DiLorenzo was a passive landlord throughout its ownership. It leased the Property to master tenants (the Palin entities), who subleased to operators, or directly to the primary operator, AMMCo. That is dispositive. Even if Goldman/DiLorenzo had been aware of discharges of hazardous substances – of which there is no evidence and would be inconsistent with its role as a passive landowner – Goldman/DiLorenzo has no liability. Without intent, Goldman/DiLorenzo cannot be an arranger under CERCLA.

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to determine whether that individual 'participated in the hazardous substance disposal activities.'") (internal citations omitted).

[16] *Lentz v. Mason*, 961 F. Supp. 709, 716 (D.N.J. 1997).

[17] *Burlington Northern,* 556 U.S. at 611.

[18] *Id.* at 612. ("In order to qualify as an arranger, Shell must have entered into the sale of D-D *with the intention* that at least a portion of the product be disposed of") (emphasis added); *id.* at 612-13 ("the evidence does not support an inference that Shell *intended* such spills to occur") (emphasis added); *see also United States v. Cornell-Dubilier Elecs., Inc.,* No. 12-5407, 2014 U.S. Dist. LEXIS 140654, at *24 (D.N.J. Oct. 3, 2014) ("Nothing in the record indicates that the Government took *intentional steps to dispose of any pollutants at the facility.* In light of this lack of evidence, the Court concludes that the Settling Parties had a rational basis for finding the Government not liable as a prior arranger").

[19] *Burlington Northern,* 556 U.S. at 611 ("knowledge alone is insufficient to prove that an entity 'planned for' the disposal").

**B. There Was No "Disposal" of Hazardous Substances for Which Goldman/DiLorenzo Is Responsible**

Goldman/DiLorenzo also has no liability under CERCLA because there is no evidence of "disposal" of hazardous substances during Goldman/DiLorenzo's ownership of the AMMCo Property. As demonstrated in the Roux Report:

- There is no evidence of any discharges of hazardous substances from the one drain (an outdoor stormwater drain) on the Property to the River;
- There are no LPRSA COCs attributable to Property soils or operations;
- There was no industrial sewer leading from operations at the AMMCo Property to the River, unlike many of the industrial sites on the River;
- There is no evidence of migration of the PCBs that were found in a single, localized location on the KIA Parcel (farther from the River) to the River that was promptly excavated and granted No Further Action status by NJDEP;
- There is no evidence that COCs in the River are attributable to groundwater flow from the Property (and EPA already has concluded that groundwater discharges are not driving any response costs for the LPRSA); and
- Even if there were River COCs that could be attributed to operations at the Property, which there is not, there is no evidence of migration to the River; stormwater runoff from the KIA Parcel was captured in storm sewers, with only infrequent overflows to the river – and there is no evidence that overflow events included hazardous substances from the Property, and the S&A Parcel was designed to absorb stormwater and limit surface runoff.

Finally, even if there were evidence of LPRSA COC migration to the river from the Property, which there is not, the Roux Report demonstrates that the few River COC's found on the Property (certain PAHs, copper and lead, and pesticides) would be attributable to historic fill. The Third Circuit Court of Appeals held in *United States v. CDMG Realty Co.*, that the "passive migration of contaminants" does not constitute "disposal" under CERCLA. Goldman/DiLorenzo thus has no liability under CERCLA for the passive migration of any hazardous substances on the Property before Goldman/DiLorenzo's ownership.

Since there is no evidence of disposal of hazardous substances for which Goldman/DiLorenzo is responsible, Goldman/DiLorenzo has no CERCLA liability.

### C. Discharges of Hazardous Substances from the AMMCO Property Have Not and Will Not Cause the Incurrence of Response Costs

A party can only be liable under CERCLA if a release of hazardous substances for which it is responsible causes the incurrence of "response costs."[20] Here, even if there were evidence of discharges of hazardous substances to the LPRSA from the AMMCo Property, which there is not, and even if Goldman/DiLorenzo were a PRP, which it is not, Goldman/DiLorenzo is not liable under CERCLA because there is no evidence that EPA has incurred, or will incur, any response costs resulting from a release of hazardous substances from the AMMCo Property.[21]

Response costs at the LPRSA are being incurred as a result of four COCs: dioxins, PCBs, mercury, and DDx. The March 3, 2016 Record of Decision ("ROD") states that human health and ecological preliminary remediation goals ("PRGs") are focused on those chemicals. The ROD specifically notes that "most active alternatives (i.e., alternatives other than No Action) designed to address these COCs would also address the other COCs."[22]

There is no evidence that Goldman/DiLorenzo is responsible for the discharge of any of these drivers to the LPRSA.

First, there is no evidence of dioxin at the AMMCo Property, nor any evidence of mercury (except background levels below EPA RSLs, not the result of operations).

Second, as the Roux Report demonstrates, the AMMCo Property is not a source of PCBs in the LPRSA. PCBs were found at a single isolated location on the Property, far from the River, and associated with a transformer on the Property; PCBs were not found in any surrounding soil samples.

Finally, although DDT was found in some soil samples on the Property, the Roux Report demonstrates that DDT concentrations are well below background levels in New Jersey urban environments like Kearny. As Roux explains, DDT and dieldrin were both used universally for insect control. There is no evidence whatsoever that these hazardous substances were used in or are associated with operations at the AMMCo Property. Thus, even if a transport mechanism from the Property to the River had been established, which it has not, Goldman/DiLorenzo is not liable for any passive migration that might have taken place from the AMMCo Property to the LPRSA.[23]

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[20] *Alcan Aluminum Corp.*, 964 F.2d at 258-59; 42 U.S.C. § 9607.

[21] *See Hatco Corp. v. WR. Grace & Co.,* 849 F. Supp. 931, 979 (D.N.J. 1994) (determining that plaintiff would not be liable for response costs because, even though it discharged hazardous substances, the PCBs discharged by the defendant "will drive the cost of the clean-up").

[22] ROD pp. 42-43.

[23] *See United States v. CDMG Realty Co.,* 96 F.3d 706, 713 (3d Cir. 1996).

Not only is there a complete absence of any evidence making Goldman/DiLorenzo responsible for these response-cost drivers; there is also no evidence that Goldman/DiLorenzo is responsible for any other COCs found in the LPRSA. As the Roux Report explains, while PAHs have been detected on the Property, (a) they are attributable to historic fill (or petroleum), (b) there is no evidence PAHs from the Property reached the LPRSA, and (c) they are not of the type found in the LPRSA. Similarly, although copper and lead were found in Property soils, they are not associated with operations at the Property but are instead attributable to historical fill.

Accordingly, there is no evidence of COC discharges from the AMMCo Property to the LPRSA for which Goldman/DiLorenzo could even arguably have liability that have caused or will cause response costs. For this reason as well, Goldman/DiLorenzo has no CERCLA liability.

## III. GOLDMAN/DILORENZO HAS ALREADY VOLUNTARILY PAID SUBSTANTIAL LPRSA RESPONSE COSTS, DESPITE HAVING NO RESPONSIBILITY

Despite its absence of liability, Goldman/DiLorenzo, through DPC, has voluntarily participated in the RI/FS and RM 10.9 removal action in the LPRSA, at substantial cost, which it continues to incur. On September 24, 2004, EPA issued a GNL to DPC asserting that hazardous substances may have been released from the Property into the LPRSA.[24] On June 15, 2005, DPC, on behalf of Goldman/DiLorenzo, informed EPA that it would execute the RI/FS Administrative Settlement Agreement and Order on Consent and join the LPRSA Cooperating Parties Group (the "CPG").[25] As EPA also knows, Goldman/DiLorenzo, through DPC, is a Settling/Funding Party under the RI/FS AOC – a designation that reflects the dearth of evidence of Goldman/DiLorenzo's responsibility for any LPRSA response costs.

In addition, in 2012, EPA requested that the CPG perform a removal action of a sediment deposit near RM 10.9 with elevated concentrations of dioxins and PCBs. In continuing cooperation with EPA, DPC and other CPG members (but not Tierra Solutions, Inc., Maxus Energy Corporation, and their contractual indemnitee Occidental Chemical Corporation Occidental Chemical Corporation (collectively "TMO") – the dominant PRPs for the LPRSA given the intentional discharges from the Lister Avenue Site), voluntarily agreed to perform the RM 10.9 removal action, which involved, in part, the dredging of approximately 16,000 cubic yards of sediment.[26] Goldman/DiLorenzo, via DPC, has been paying its share in connection with the RM 10.9 removal action.

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[24] *Id.* at 2.

[25] Letter from Steven R. Gray to Kedari Reddy (June 15, 2005).

[26] EPA, Administrative Settlement Agreement and Order on Consent for Removal Action (June 18, 2012).

## IV. GOLDMAN/DILORENZO SHOULD BE OFFERED AN EARLY BUYOUT SETTLEMENT.

EPA should offer an early buyout settlement to Goldman/DiLorenzo for two reasons: (i) there is no credible evidence upon which to base Goldman/DiLorenzo's alleged liability for LPRSA response costs, and (ii) CERCLA requires that EPA "facilitate [settlement] agreements … that are in the public interest[.]"[27] An early buyout settlement with Goldman/DiLorenzo is consistent with these statutory provisions and EPA's guidance. For the reasons below, an early buyout settlement offer to Goldman/DiLorenzo is in the public interest because it would avoid further unnecessary transaction costs for EPA and Goldman/DiLorenzo, and EPA would recover past and future response costs.

### A. The AMMCo Property's Discharges to the LPRSA Were Non-Existent and Therefore Minimal in Amount

The Roux Report establishes that there is no evidence of discharges of hazardous substances from the AMMCo Property to the LPRSA. There was no industrial sewer; no evidence of dumping of hazardous chemicals; no evidence of discharge of hazardous substances through the one outdoor stormwater drain (on the S&A Parcel); and no correlation between COCs in the LPRSA and in Property soils or groundwater (apart from hazardous substances in historic fill, for which Goldman/DiLorenzo is not responsible). Even if such a correlation existed, moreover, there is no evidence of a transport mechanism for hazardous substances from the Property to the LPRSA – the gravel-covered S&A Parcel nearer to the river would have prevented surface runoff, and runoff from the KIA Parcel went to the PVSC stormsewer and there is no evidence that any overflow events contained hazardous substances from the Property.

In light of the many larger PRPs on the LPRSA, often with documented direct discharges to the LPRSA, it is impossible to posit that the AMMCo Property's contribution of hazardous substances to the LPRSA (even if evidence of such discharges existed, which it does not) could be any more than "minimal in comparison to other hazardous substances."[28] EPA should therefore offer Goldman/DiLorenzo an early buyout settlement.

### B. The AMMCo Property's Discharges to the LPRSA Were Non-Existent Or, if Any, Would Not Cause the Incurrence of Response Costs

Response costs at the LPRSA are being driven primarily by dioxin and, to a much lesser extent, PCBs, mercury, and DDx.[29] As already demonstrated in this letter and in the Roux Report,

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[27] 42 U.S.C. § 9622(a); *see also* 42 U.S.C. § 9622(g)(1) ("Whenever practicable and in the public interest," EPA shall "as promptly as possible reach a final settlement with a potentially responsible party" who is *de minimis*).

[28] 42 U.S.C. § 9622(g)(l)(A).

[29] ROD pp. 42-43.

there is absolutely no evidence of dioxin on the AMMCo Property, nor of mercury beyond background levels, much less a discharge of dioxin or mercury from the Property to the LPRSA. PCBs were found on the Property only in a single isolated location, and surrounding soils are PCB-free. Finally, DDT was found in the Property only in concentrations well below background values; there is no evidence of use of those DDT in site operations. Goldman/DiLorenzo has no responsibility for whatever miniscule amounts of these chemicals might, speculatively, have passively migrated from the Property (and there is no evidence any did so).[30]

Accordingly, the toxicity of any hazardous substances that might, speculatively, have migrated from the Property to the LPRSA (and they did not) is also "minimal in comparison to other hazardous substances" in the LPRSA, and would not affect response costs. Goldman/DiLorenzo is therefore an ideal candidate for an early buyout settlement.

### C. Offering Goldman/DiLorenzo an Early Buyout Settlement Is in the Public Interest

Offering Goldman/DiLorenzo an early buyout settlement is indisputably "in the public interest."[31] Entering into a settlement with Goldman/DiLorenzo (a party that is neither a former owner nor operator, nor an arranger for the disposal of hazardous substances in the LPRSA) now has several benefits, as recognized in EPA's own guidance: (i) reducing transaction costs for EOA and Goldman/DiLorenzo, (ii) reimbursing EPA past costs, (iii) providing funds for future response actions at the LPRSA, and (iv) providing an incentive for other parties to settle their potential liability.[32]

For all these reasons, EPA should offer Goldman/DiLorenzo an early buyout settlement.

## V. CONCLUSION

Notwithstanding the fact that, as demonstrated above, Goldman/DiLorenzo has no connection to the LPRSA and the LPRSA COCs, Goldman/DiLorenzo has fully cooperated in good faith and already paid substantial LPRSA response costs. In light of this, Goldman/DiLorenzo respectfully submits that it is not only eligible but is a perfect candidate for an early buyout

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[30] *See United States v. CDMG Realty Co.*, 96 F.3d 706, 713 (3d Cir. 1996).

[31] 42 U.S.C. §9622(g)(l)(A).

[32] *See* EPA, Standardizing the *De Minimis* Premium, at 1 (July 7, 1995) ("In addition to reducing transaction costs and resolving the liability of small volume contributors, *de minimis* settlements also serve to reimburse the Agency's past costs and provide funds for future site cleanup."); EPA, "Methodologies for Implementation of CERCLA Section 122(g)(l)(A) De Minimis Waste Contributor Settlements" at 2 (Dec. 20, 1989) *(de minimis* settlements "provide an incentive to *non-de minimis* parties to settle simultaneously by offsetting the contributions of *de minimis* parties from the total cost of the response action").

settlement. Goldman/DiLorenzo would welcome the opportunity to discuss this matter with EPA further and avoid further transaction costs for the LPRSA matter.

Very truly yours,

COLE SCHOTZ P.C.

David M. Kohane

DMK:hkk
Enclosure
cc: Alice Yeh (*EPA Region 2) (via e-mail*) *(YEH.ALICE@EPA.GOV)*
Juan Fajardo, Esq. (*EPA Region 2) (via e-mail)(FAJARDO.JUAN@EPA.GOV)*
Richard J. Ericsson, Esq. (*Cole Schotz PC*)